

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WILLIAM HANSBAUER, individually and
on behalf of all others similarly situated,

Plaintiff,

DECISION AND ORDER

14-CV-00138(S)(M)

v.

DELAWARE NORTH COMPANIES
SPORTSERVICE, INC.,

Defendant.

Before me is plaintiff's motion pursuant to 29 U.S.C. §216(b) for conditional certification of this action as a collective action under the Fair Labor Standards Act of 1938 (29 U.S.C. §201 *et seq.*) and for court-authorized notice to potential opt-in plaintiffs [18].¹ That motion is nondispositive. Ahmed v. T.J. Maxx Corp., 2013 WL 2649544 *6 (E.D.N.Y. 2013); Barrus v. Dick's Sporting Goods, Inc., 465 F. Supp.2d 224, 229 n. 1 (W.D.N.Y. 2006) (Feldman, M.J.).

Defendant opposes the motion on several grounds, including plaintiff's failure to "establish that there are any similarly situated employees who desire to opt in and become plaintiffs in this case". Defendant's Memorandum of Law [21], p. 10. Defendant argues that "[a] plaintiff seeking certification of a collective action under section 216(b) must . . . establish that there are similarly situated employees who desire to opt in and become plaintiffs in the case". Id. (quoting Colozzi v. St. Joseph's Hospital Health Center, 595 F. Supp.2d 200, 205 n. 5 (N.D.N.Y.

¹

Docketed references are to CM/ECF docket entries.

2009)). *See also Dybach v. Florida Department of Corrections*, 942 F.2d 1562, 1567 (11th Cir. 1991).

Although defendant's attorney emphasized this point during oral argument yesterday [23], neither in his Reply Memorandum of Law [22] nor at oral argument did plaintiff respond to it. Therefore, for purposes of this motion, that argument is conceded. *See Miles v. Levac*, 2014 WL 1338808, *3 (W.D.N.Y. 2014) (McCarthy, M.J./Skretny, J.) ("A plaintiff effectively concedes a defendant's arguments by his failure to respond to them"); *Frey v. Bekins Van Lines, Inc.*, 748 F. Supp.2d 176, 182 (E.D.N.Y. 2010) ("Plaintiffs have not responded to this argument, and the court therefore deems the matter to be conceded").

Accordingly, without addressing the parties' other arguments, the motion is denied.

SO ORDERED.

DATED: June 19, 2014

/s/ Jeremiah J. McCarthy
JEREMIAH J. MCCARTHY
United States Magistrate Judge